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86-676①

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Supreme Court, U.S.
FILED

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CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986.

EMILY FULLER GIBSON, MICHELLE GIBSON,
and MELANIE GIBSON, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a claim under the Tort Claims Act is time barred if submitted more than two years following the underlying tortious conduct notwithstanding governmental attempts to conceal the basis of its own liability and notwithstanding Plaintiffs' presentation of a claim within two years of the date upon which claimants acquired information indicating governmental responsibility for the conduct in question;

2. Whether in an action arising under 42 U.S.C. section 1983 and under U.S. Constitutional Amendments in which Plaintiffs claim to have been victimized by a conspiracy to violate their civil and Constitutional rights, such claims are timely as to all overt acts allegedly committed in furtherance of the conspiracy if the action was commenced within the applicable limitations period following the last alleged overt

(II)

act, or whether plaintiffs' claims in such an action are barred as to all overt acts committed outside the applicable limitations periods ;

3. Whether in actions arising under 42 U.S.C. section 1983, the "last overt act doctrine" governing conspiracy cases is a principle of tolling for limitations purposes and, if so, whether the accrual of civil rights conspiracy claims predicated upon section 1983 is to be governed by state rather than federal law under this Court's decision in Board of Regents vs. Tomanio, 446 U.S. 478 (1980). ¹

1. The parties before the Court of Appeals in this case, Emily Fuller Gibson, et al., vs. United States of America, et al., 83-6118, were Emily Fuller Gibson, Michelle Gibson and Melanie Gibson, Plaintiffs and Appellants, and the United States of America, William French Smith, Attorney General of the United States, William Webster, Director, Federal Bureau of Investigation (FBI), Will Heaton, Special Agent, FBI, Brandon Cleary, Special Agent, FBI, Darthard Perry, aka Ed Riggs, The City of Los Angeles, Daryl Gates, Chief, Los Angeles Police Department (LAPD), Defendants and Appellees.

(III)

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No. _____

IN THE SUPREME COURT
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October Term, 1986

EMILY FULLER GIBSON, MICHELLE GIBSON,
and MELANIE GIBSON, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner hereby petitions for a writ
of certiorari to review the judgment of the
United States Court of Appeals for the Ninth
Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals,
which is reported at 781 F.2d 1334 (9th Cir.
1986), is attached hereto as Appendix A.
The Court of Appeals' unreported order
of July 22, 1986 denying a Petition for
Rehearing and Suggestion for Rehearing En

Banc filed on behalf of Petitioners herein is attached hereto as Appendix B. The District Court's order dismissing Petitioners' Second Amended Complaint is attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was filed on January 30, 1986, and a timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied by order dated July 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the statute of limitations requirements governing cases brought under the Federal Tort Claims Act. The pertinent statutory language from 28 U.S.C. section 2401(b) is as follows:

"A tort claim against the United States shall be forever barred un-

less it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented "

STATEMENT OF THE CASE

On July 1, 1980, Plaintiffs commenced an action for damages in the present case against Respondents. (Excert or Record before Court of Appeals, hereinafter designated as ER, page 74). Ultimately, Plaintiffs filed a Second Amended Complaint with leave of court. (ER 1-25). At issue in this proceeding is the fate of Plaintiffs' First, Third and Fourth Claims for Relief, which were respectively predicated upon 42 U.S.C. section 1983, various U.S. Constitutional Amendments, (First, Fourth, Fifth, Ninth and Fourteenth) and the Federal Tort Claims Act. (id).

In their First Claim, Plaintiffs alleged a conspiracy to violate their civil and constitutional rights under 42 U.S.C. section 1983. (ER 4-21). The conspiracy was initially formed by F.B.I. agents during the late 1960's and was later joined by officers of the Los Angeles Police Depart-

ment. (ER 4). The conspiracy was motivated by a desire to disrupt Plaintiffs' capacity to exercise First Amendment freedoms. Other objects of this agreement included the disruption of Emily Gibson's capacity to earn a livelihood in order to accomplish her neutralization as a political and civil rights activist, the attempted procurement of her prosecution by means of entrapment schemes, the invasion of Plaintiff's privacy interests, their subjection to a campaign of intimidation and fear, the subjection of their residence to a campaign of unlawful surveillance and the deterrence of continued involvement by members of the Gibson family in efforts to achieve an end to social injustice. Also listed as an object of this conspiracy was the compilation of political intelligence data about Plaintiffs and civil rights activists generally. (id).

In furtherance of this conspiracy, Plaintiffs alleged that defendants committed a number of overt acts over a period exceeding fifteen years. Plaintiffs alleged that

in 1974, Defendant Darthard Perry burned down their residential garage after searching for papers contained in boxes located inside the garage. The boxes contained unphotocopied doctoral dissertation notes of Angela Davis, herself a subject of considerable interest to the FBI. The garage and its contents were totally destroyed. Perry, according to Plaintiffs, committed these crimes pursuant to instructions from FBI agent Will Heaton. Following this arson, Perry attempted to induce Plaintiff Emily Gibson to commit insurance fraud by overstating the cost of replacing her garage and installed electronic listening devices at the Gibson residence. FBI agents caused a false report to be filed with fire department officials suggesting that the Gibson garage had been a congregation point for neighborhood juveniles smoking marijuana, thereby intending to conceal the truth about this arson. (ER 8-10).

Later that year, FBI agents attempted

to precipitate Emily Gibson's entrapment by inducing New York police officers to unsuccessfully offer her narcotics aboard a transcontinental airline flight. (ER 9-10). Several months earlier, Los Angeles Police Department officers, acting in furtherance of this conspiracy, caused Plaintiffs' residence to be surrounded without justification by its SWAT (Special Weapons and Tactics) Squad, forcing Plaintiffs to leave their residence and endure interrogation in a parking lot before onlookers and neighbors concerning the whereabouts of prominent FBI fugitives. (ER 11-12).

In 1976, Plaintiffs' residence was burglarized as a result of Defendants' efforts. (ER 15). That same year, Defendants precipitated the termination of Emily Gibson's employment by spreading rumors that she was a communist. This termination became effective in 1977. (ER 13-15). Similar tactics had been

been employed, with similar success, by Defendants against Emily Gibson in 1972. (ER 7-8).

Plaintiffs alleged that they had been the continual targets of unlawful electronic surveillance over their residential telephone from 1974 through the filing of their First Amended Complaint. (ER 10, 19-21). They also charged that their residence was the target of unjustified physical surveillance activity undertaken, inter alia, through police helicopter overflights at various times from 1970 through 1978. (ER 20-21).

Having learned in 1978 through unlawful telephone surveillance activity that Plaintiffs intended to prosecute litigation against Defendants in connection with the foregoing allegations, Defendants successfully induced yet another interference with Emily Gibson's then-current employment and caused the commission of yet another burglary at the Gibson residence in 1979. (ER 16-17). Never-

theless, the Plaintiffs filed a Tort Claim in March of 1979 with the F.B.I. (ER 17). During the period intervening between this claim's denial and the expiration of Plaintiffs' chance to file suit, Defendants induced a friend of Darthard Perry to contact Emily Gibson in order to ask about her current political activities. (ER 17). Once Plaintiffs actually filed suit in the instant case in 1980, Defendants immediately caused the transmission of defamatory information to Emily Gibson's new employer indicating that she was a communist, thereby triggering this employment relationship's termination. (ER 18). That same year, Defendants then instigated the effectuation of yet another burglary and arson at Plaintiff's residence. Prior to setting fire to a structure on Plaintiffs' lot, Defendants' agent removed papers from those premises which pertained to Emily Gibson's relationship with Angela Davis. (ER 18-19).

Plaintiffs Third Claim was based upon the foregoing allegations and arose under various federal Constitutional Amendments (First, Fourth, Fifth, Ninth and Fourteenth). This claim involved allegations identical to those set forth in support of Plaintiffs' First Claim

Plaintiffs' Fourth Claim arose under the Federal Tort Claims Act and was directed against the United States government.

Both the Federal and City Defendants moved to dismiss Plaintiff's Complaint. (ER 74). The motion was granted with leave to amend. (id). Ultimately, a Second Amended complaint was filed, to which Defendants again responded with dismissal motions. (ER 25, 36, et seq.). In their motions, Defendants attacked the timeliness of Plaintiffs' statutory, Bivens and tort claims. (id). These motions were opposed by Plaintiff (ER 43, et seq., 68, et seq.) but were ultimately granted. (25a-27a, infra).

In seeking dismissal of Plaintiff's Fourth Claim, which was based upon the Tort Claims Act, the government asserted that Plaintiffs were obligated to file their claim within two years of the underlying torts' commission. (ER 54). In its Motion to Dismiss the initial complaint, the government had attached a copy of Plaintiffs' tort claim, (ER 74), as Plaintiffs pointed out in their memorandum opposing dismissal of the Second Amended Complaint. (ER 62). The Claim asserted that in January of 1974, the Gibson residence was subjected to Darthard Perry's burglary and arson attack and became the subject of electronic surveillance activity. The claim was filed on March 30, 1979, within two years of the date upon which Plaintiffs asserted in their Claim that they initially discovered facts suggesting FBI responsibility for the January 1974 arson-burglary incident through a magazine article detailing Darthard Perry's confession of responsibility for an identical transaction. Plaintiffs argued that under these circum-

stances, their tort claim was timely. (ER 62). The Ninth Circuit Court of Appeals upheld the Tort Claim's dismissal, rejecting Plaintiffs' contention that a tort claim need only be presented within two years of the date upon which claimants acquire information suggesting governmental responsibility for having inflicted the tortious injuries in question. (Infra, 18a-19a). The Court held that such a claim must, under 28 U.S.C. section 2401(b), be submitted within two years of of the date upon which claimants learn of their subjection to tortious injury regardless of whether they do not then know about facts suggesting governmental responsibility for having inflicted such injury. (id). ^{1/}

^{1/} The Court of Appeals also held that Plaintiffs had failed to allege the elements of a fraudulent concealment tolling defense in connection with their Governmental Tort Claim. (Infra, 19a-20a). However, as Plaintiffs pointed out in their Petition for Rehearing (11), the government did not even raise this point until filing its reply to Plaintiffs' memorandum opposing dismissal of the Second Amended Complaint. Plaintiffs argued that leave to amend should have been afforded. (id).



In seeking dismissal of Plaintiffs' civil rights and Bivens claims, Defendants maintained that the statute of limitations in such conspiracy cases begins to run separately from each particular overt act's commission. (ER 44). Plaintiffs maintained that in such cases, the statute of limitations begins to run as to all overt acts on the date of the last act's commission. (ER 44).

The Court of Appeals sustained the Defendants' position on this issue, affirming the dismissal of all portions of Plaintiffs' statutory claim which pertained to acts committed more than three years prior to the present litigation's commencement and affirming the dismissal of all portions of Plaintiffs' Bivens claim which involved acts committed more than four years before that date. (Infra, 10a-12a, 15a, 21a). In other respects, the district court's dismissal order was reversed. (Infra, 21a).

REASONS FOR GRANTING THE WRIT

This case presents the Supreme Court with an opportunity to decide the question of whether the statute of limitations in a case arising under the Federal Tort Claims Act begins to run at the time claimants learn about their subjection to tortious injury even though they are not then aware of facts indicating governmental responsibility for such injury's infliction. The Ninth Circuit's published opinion in this case provides authority for an affirmative answer to this question.

Yet such an answer, as even the Ninth Circuit expressly noted below, seems to conflict with language from this Court's opinion in United States vs. Kubrick, 444 U.S. 111 (1979). As the Court of Appeals observed:

"Language in Kubrick, emphasizing the strategic importance to the litigant of knowing whom to sue, supports plaintiffs' proposed

construction. See 444 U.S. at 122 ('the prospect is not so bleak for a plaintiff in possession of the critical facts that he had been hurt and who had inflicted the injury'). However, binding circuit precedent forecloses us from considering such an extension of Kubrick." (Infra, 19a).

In the present case, the Court of Appeals held that the delayed acquisition of facts suggesting governmental responsibility for the 1974 burglary-arson attack upon the Gibson garage would not in itself serve to extend the limitations period's inception beyond the normal two-year interval following the underlying torts' commission. The Court then held that in order to save their tort claim, plaintiffs must allege that they actually and reasonably relied upon governmental misrepresentations designed to conceal the basis for

official liability. According to the Ninth Circuit, any such claims of justifiable reliance would not have been reasonable, since Plaintiffs' claims to have discovered an incendiary device on the scene foreclosed their acceptance of governmentally originated mis-information designed to lay blame for this fire upon marijuana-smoking juveniles. (Infra, 20a). Accordingly, the Court of Appeals sustained the dismissal of Plaintiffs' Tort Claim.

The Ninth Circuit's holding in this case does not seem to square with this Court's limitations analysis in Kubrick, as the panel itself noted. In Kubrick, this Court held that in medical malpractice cases arising under the Tort Claims Act, the limitations period commences once plaintiff acquire information concerning the existence and cause of his injury

but regardless of whether such knowledge includes an awareness of the fact that malpractice was committed. This Court reasoned that a plaintiff who had learned facts identifying his injury and its cause would be in a position to discover other facts necessary to a claim's identification and prosecution. The above-quoted passage from Kubrick, quoted in its entirety, follows:

"The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask. If he does ask and if the defendant has failed to live up to minimum standards of medical proficiency, the odds are that



a competent doctor will so inform the plaintiff." (444 U.S., 122).

It is obvious that Plaintiffs in the present case are in a far different position. As the Second Circuit Court of Appeals noted in Barrett vs. United States, 689 F.2d 324 (2nd Cir. 1982):

". . .the instant situation is unusual because even if the plaintiffs knew what caused Blauer's death, the path to unmasking who was responsible may well have been blocked. It is illogical to require a party to sue the government for negligence at a time when the Government's responsibility in the matter is suppressed in a manner designed to prevent the party, even with reasonable diligence, from finding out about it." (id., 330).

The Court of Appeals in Barrett then approvingly cited Liuzzo vs. United States, 485 F.Supp. 1274 (E.D. Mich. 1980), as yet another case presenting "an instance in which knowledge of the identity of the tortfeasor is a critical element to the accrual of a claim." The Second Circuit in Barrett described Liuzzo as follows:

"In Liuzzo the children of a slain civil rights worker were permitted to bring an action under the FTCA many years after their mother's death. At that time it was revealed that a paid F.B.I. informant, whose testimony had helped convict certain Ku Klux Klansmen of the murder, had personally participated in the killing. There, as here, misrepresentations and concealed information had justifiably led the plaintiffs to believe that those responsible for their parent's death had been punished.



. . .The court also stated that even if the children were obligated to look more deeply into the matter, it was not clear that the F.B.I. would reasonably have been a target of their inquiry."

(Barrett, supra, 330).

If the Ninth Circuit had applied this line of reasoning from Barrett and Luizzo to the present case, it would have been compelled to conclude that "it is not clear that the F.B.I. would have been a target of [these Plaintiffs'] inquiry" despite their discovery of an incendiary device in the charred remains of their garage. In the present case, as in Barrett and Liuzzo, government agents were alleged to have attempted to conceal governmental responsibility for the tortious conduct in question. The fact that such fraudulent conduct in the present case may not have succeeded in convincing Plaintiffs to



even initially cast blame for the arson upon neighborhood youths seems quite beside the point. The real point is that Plaintiffs, unlike Kubrick but like claimants in Luizzo and Barrett, did not acquire information suggesting governmental responsibility for the tortious conduct in question within sufficient time to make possible their presentation of a tort claim within two years from the attack upon their garage. In all three cases, moreover, plaintiffs alleged that the government attempted to conceal its role.

The present decision by the Ninth Circuit thus marks a sharp departure from opinions from other circuits addressing this question. Except for the present case, it appears to be true, as observed by the Second Circuit in Barrett, supra, that "[c]ases which have held that the identity of the Government as a potential defendant need not be known to a plaintiff

in order for his FTCA cause of action to accrue involved situations where the 'who' element was not actively being concealed. In those cases diligent discovery would have revealed the Government's role." (id., 330). As is clear from the pleadings, the F.B.I.'s responsibility for the 1974 burglary-arson attack upon the Gibson garage was "being actively concealed." It is equally inarguable that no amount of "diligent discovery" would have likely disclosed the F.B.I.'s role in these events had Darthard Perry not confessed to a journalist, implicating Will Heaton as the F.B.I. agent who ordered the entire attack. Plaintiffs submitted their claim within two years of the date upon which Perry's confession was published. They could not have proceeded with greater diligence under these circumstances.

The Ninth Circuit's decision in the present case creates a clear and undeniable conflict among the circuits. The Second

and Sixth along with the Eighth Circuits follows Barrett's reasoning. (Barrett, supra; Diminnie vs. United States, 728 F.2d 301, 305 [6th Cir. 1984]; Wollman vs. Gross, 637 F.2d 544 [8th Cir. 1980]).

The Ninth Circuit in this case has imposed upon such similarly situated claimants not only the burden of alleging governmental concealment efforts but also but the duty to assert that such efforts in themselves were sufficiently credible to have induced actual and reasonable reliance the alternative hypothesis of responsibility which government agents sought to advance through such efforts. The Court of Appeals in this case has held, in effect, that Plaintiffs' Tort Claim is foreclosed simply because official efforts to implicate neighborhood juveniles were not credible under the circumstances. Yet there is nothing about such an attempt to implicate

neighborhood young people which should have served to identify the F.B.I. and Defendants herein as probable culprits. This is the underlying falacy in Gibson's resolution by the Ninth Circuit, which has adopted a rule that allows the government to acquire immunity by the simple device of supplementing its concealment efforts with ineffective attempts to implicate others with responsibility for official torts.

The second set and third issues presented in this Petition involve the accrual of civil rights and Bivens claims in conspiracy cases. In this case, the Ninth Circuit has held that it is not enough that the last overt act in furtherance of a conspiracy was committed within the applicable limitations period. To remain actionable, each particular overt act must, ruled the Court, have been committed within such a period. Plaintiff may not recover damages sustained in connection with overt acts

outside the limitations period, and a claim for relief for damages sustained in a conspiracy case accrues separately from each overt act's commission.

This rule differs from that follows by some courts. For instance, in California, a plaintiff who commences litigation within the statutory period following the last overt act's commission may recover damages incurred in connection with all other overt acts, including those committed beyond the applicable limitations period. See Wyatt vs. Union Mortgage Co., 24 Cal. 3d 773, 786 (1979), cited *infra* at 10a. This case presents an opportunity to decide which rule best suits the purpose of section 1983 and Bivens conspiracy actions.

The Ninth Circuit settled this dispute by noting that federal rather than state law determines the accrual of claims in federal civil rights conspiracy cases. Yet in Board of Regents vs.



Tomanio, 446 U.S. 478 (1980), this Court expressly held that in federal civil rights cases, federal courts must follow state decisional law in resolving disputes concerning the tolling of limitations periods. The Supreme Court of the State of California has explicitly described its last-overt-act limitations doctrine as a principal of tolling as well as a principal of accrual. (Wyatt, supra 786-788). Under Tomanio, it would seem that Wyatt should have been applied by the Ninth Circuit to the present case, thus saving all of Plaintiffs' overt act allegations.

The present case would enable this Court to decide the question of whether Tomanio requires adoption of state decisional law in determining the point at which limitations periods commence in civil rights conspiracy actions.

This question was ignored by the Ninth Circuit in its opinion (infra 10a-11a) but was raised below. (Ap-

pellants' Opening Brief, 24-25, Appellants' Reply Brief, 4-8; Petition for Rehearing, 6-7).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition be granted.

Respectfully Submitted,

DATED: October 20, 1986

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EMILY FULLER GIBSON, MICHELLE
GIBSON and MELANIE GIBSON,
Plaintiffs-Appellants.

v.

UNITED STATES OF AMERICA,
WILLIAM FRENCH SMITH, Attorney
General of the United States;
WILLIAM WEBSTER, Director,
Federal Bureau of Investigation
(FBI); WILL HEATON, Special
Agent, FBI; BRANDON CLEARY,
Special Agent, FBI; DARTHARD
PERRY, aka ED RIGGS; THE CITY OF
LOS ANGELES; DARYL GATES, Chief,
Los Angeles Police Department
(LAPD),
Defendants-Appellees.

No. 83-6118

D.C. No.
CV 80-2858 AAH

ORDER AND
AMENDED
OPINION

Argued and Submitted
September 4, 1984—Pasadena, California
Submission vacated May 9, 1985
Resubmitted May 30, 1985

Filed January 30, 1986
Amended March 4, 1986

Before: William A. Norris and Robert R. Beezer, Circuit
Judges, and Carl A. Muecke,* District Judge.

Opinion by Judge Norris

*The Honorable C.A. Muecke, United States District Judge, District of
Arizona, sitting by designation.



Appeal from the United States District Court
for the Central District of California
A. Andrew Hauk, District Judge, Presiding

SUMMARY

Civil Rights/Governmental Torts/Courts and Procedure

Appeal from dismissal of complaint alleging a conspiracy to violate civil rights. Affirmed in part, reversed in part and remanded.

Plaintiffs commenced this litigation seeking compensatory and punitive damages for an alleged long-lasting conspiracy to violate their civil rights. The common theme of the allegations is that federal and municipal agents sought to penalize and discourage plaintiff Emily Gibson's controversial political activities through an unremitting campaign of terror and harassment. Named as defendants were the United States, the City of Los Angeles, two named FBI agents, and several unknown agents of the Los Angeles Police Department (LAPD) and the FBI.

[1] The dismissal of the City on the ground that Gibson failed to attribute the alleged tortious acts of city agents to an established city policy or procedure is upheld. A municipality cannot be held liable under 42 U.S.C. § 1983 on a *respondeat superior* theory. In resolving the section 1983 claim against the individual city defendants, a plaintiff, [2] to make out a cause of action under section 1983, must plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes. Plaintiffs here have alleged discrete acts of police surveillance and intimidation (including low-altitude helicopter flights over their residence) directed solely at silencing them. Plaintiffs have thus stated a judicially cognizable claim of "specific



... objective harm" arising from violation of First Amendment rights.

[3] In *Wilson v. Garcia*, 105 S.Ct. 1938 (1985), the Supreme Court held that section 1983 claims should be invariably characterized as personal injury actions for the purpose of identifying which state period of limitation should be borrowed under section 1988. [4] When retroactive application of *Wilson* would shorten the statute of limitations, *Wilson* merits only prospective relief. [5] Thus, the three-year California limitations period is enforced. The only allegation satisfying this limitation, however, involves the pattern of retaliatory helicopter overflights.

[6] The Ninth Circuit determines the accrual of civil conspiracies for limitations purposes in accordance with the last overt act doctrine. Accordingly, plaintiffs may recover only for the overt acts (helicopter overflights) that they specifically alleged to have occurred within the three-year limitations period.

[7] Plaintiffs failed to allege that the law enforcement abuses they claimed they suffered were on account of their race and because the Court cannot "supply essential elements of the claim that were not initially pled," the dismissal of the 42 U.S.C. § 1985(3) claim is affirmed. [8] Because plaintiffs have alleged that FBI agents acted with the impermissible motive of curbing Gibson's protected speech, they have asserted a claim properly cognizable through a *Bivens*-type action directly under the First Amendment. [9] The dismissal of the *Bivens* claim under the First and Fourth Amendments to the extent it is based on activity after July 1, 1976 is reversed because California Code of Civil Procedure § 343's catch-all four-year limitation period applies. [10] The dismissal of the section 1983 claim against individual federal defendants is affirmed.

[11] Plaintiff's claim under the Federal Tort Claims Act was time-barred. [12] The claim accrued in 1974 when they



learned of property destruction through fire and not, as plaintiffs argued, in 1977 when they discovered FBI agents were involved in the burning of the garage. [13] Nor can plaintiffs avoid the time-bar of the FTCA through a fraudulent concealment theory.

COUNSEL

Lawrence Teeter, Los Angeles, California, for the plaintiffs-appellants.

Stephen D. Petersen, Assistant United States Attorney, Los Angeles, California; Katherine Hamilton, Los Angeles, California, for the defendants-appellees.

ORDER

In response to the federal government's motion for clarification, the opinion shall be amended by adding the following footnote at the end of the run-over paragraph on page 15 of the slip opinion.

Because the allegations against the named FBI agents Will Heaton and Brandon Cleary concern conduct that allegedly transpired before July 1, 1976, our holding with respect to the limitations period for *Bivens* claims affirms the District Court's dismissal of these defendants from the suit.

This footnote will be located and numbered as follows:

line 14, page 15: "activity after July 1, 1976."

The existing footnotes will remain in the opinion unchanged.



OPINION

NORRIS, Circuit Judge:

Plaintiffs Emily Gibson and her daughters, Michelle and Melanie, commenced this litigation on July 1, 1980, seeking compensatory and punitive damages for an alleged long-lasting conspiracy to violate their civil rights. The initial complaint joined as defendants the United States of America, the City of Los Angeles, two named FBI agents, and several unknown agents of the Los Angeles Police Department (LAPD) and the FBI. Detailed in this complaint is a farrago of allegations, the common theme of which is that from the late 1960's through the eve of this lawsuit federal and municipal agents sought to penalize and discourage Emily Gibson's controversial political activities through an unremitting campaign of terror and harassment. The Gibsons claim that this campaign violated their constitutional rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments and, in addition, seek relief under a variety of overlapping statutory theories.

After twice dismissing plaintiffs' complaint with leave to amend, the District Court finally dismissed their Second Amended Complaint with prejudice for failing "to specifically allege facts, not barred by the statute of limitations, sufficient to state a claim upon which relief can be granted." Plaintiffs brought a timely appeal from this final order of dismissal. We exercise jurisdiction over this appeal under 28 U.S.C. § 1291. *Conerly v. Westinghouse Electric Corp.*, 623 F.2d 117, 119 (9th Cir. 1980). Moreover, we review the District Court's dismissal de novo, mindful that the "controlling standard, first enunciated in *Conley v. Gibson*, 355 U.S. 41 (1957), is that an action may be dismissed for failure to state a claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sherman v. Yahaki*, 549 F.2d 1287, 1290 (9th Cir. 1977), quoting *Conley*, *supra* at 45-46.



I. § 1983 CLAIM AGAINST THE CITY

[1] Plaintiffs seeks to recover damages from the City of Los Angeles as well as several unnamed city agents under section 1983. Preliminarily, we uphold the dismissal of the City on the ground that Gibson failed to attribute the alleged tortious acts of city agents to an established city policy or procedure. It is settled law that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978). Instead, plaintiff must allege that the action inflicting injury flowed from either an explicitly adopted or a tacitly authorized city policy. *Monell* at 691-691; *Harris v. City of Roseburg*, 664 F.2d 1121, 1130 (9th Cir. 1981) ("Official policy" within the meaning of *Monell* [encompasses situations] where a municipality 'impliedly or tacitly authorized, approved, or encouraged' illegal conduct by its police officers.") (quoting *Turpin v. Mailet*, 619 F.2d 196, 201 (2nd Cir.), cert. denied, 449 U.S. 1016 (1980)). Because plaintiffs do not allege facts sufficient to satisfy the *Monell* predicate for municipal liability, we affirm the dismissal of the City of Los Angeles and its Chief of Police.

II. § 1983 CLAIM AGAINST THE INDIVIDUAL CITY DEFENDANTS

[2] The section 1983 claim against the individual city defendants is less easily resolved. To make out a cause of action under section 1983, plaintiffs must plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes. See *Smith v. Cremins* 308 F.2d 187, 190 (9th Cir. 1962). Giving the Second Amended Complaint the sympathetic construction required at the motion to dismiss stage, we believe that the Gibsons have alleged facts sufficient to state a claim that city agents, acting under color of state law, caused the deprivation of their constitutional rights. If we assume the truth of plaintiffs' adequately pleaded allegations, unknown



members of the LAPD engaged in frequent low-altitude helicopter flights over their residence in order to inhibit Gibson's confrontational yet non-violent political activities. State action designed to retaliate against and chill political expression strikes at the heart of the First Amendment. *Perry v. Sindermann*, 408 U.S. 593 (1972); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958); see also *McKinley v. City of Eloy*, 705 F.2d 1110, 1113 (9th Cir. 1983), *Davis v. Village Park II Realty Co.*, 578 F.2d 461, 463 (2nd Cir. 1978). Accordingly, the victim of such action is entitled to sue the responsible state agents under section 1983. See *Anderson v. Central Point School District*, 746 F.2d 505 (9th Cir. 1984) (coach suspended for corresponding directly with School Board on matters of public concern); *McKinley*, 705 F.2d at 1113 (probationary employee laid off for airing public criticism of city policies); see also *Burnett v. Grattan*, 104 S.Ct. 2924 (1984) (assuming availability of section 1983 remedy for infringement of constitutionally protected speech); *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) (same). Although plaintiffs may not recover merely on the basis of a speculative "chill" due to generalized and legitimate law enforcement initiatives, *Laird v. Tatum*, 408 U.S. 1, *re'g denied* 409 U.S. 801 (1972), they have alleged discrete acts of police surveillance and intimidation directed solely at silencing them. Hence, we conclude that they have stated a judicially cognizable claim of "specific . . . objective harm" arising from the violation of their First Amendment rights. *Id.* at 14.

To identify those acts which remained actionable at the time plaintiffs tolled the statute of limitations on July 1, 1980, we must determine (1) the statute of limitations applicable to section 1983 claims arising in California at the time of this action and (2) the principles governing the accrual of actions alleging federal civil rights conspiracies. We conclude that plaintiffs have stated a claim that is not time barred based on the retaliatory helicopter overflights allegedly occurring after July 1, 1977.



A. *The Applicable Statute of Limitations*

[3] The first question—the applicable statute of limitations—depends on the retroactivity of *Wilson v. Garcia*, 105 S.Ct. 1938 (1985). In *Wilson*, the Supreme Court held that section 1983 claims should be invariably characterized as personal injury actions for the purpose of identifying which state period of limitation should be borrowed under section 1988. The parties agree that after *Wilson* the statute of limitations for section 1983 actions brought in California will be one year. Until *Wilson*, this Circuit applied a longer three-year statute of limitations. *Smith v. Cremins*, 308 F.2d 187 (9th Cir. 1962). Therefore, if *Wilson* retroactively governs plaintiffs' section 1983 claim, a significant portion of their complaint concededly timely when filed will be time-barred.

[4] In *Rivera v. Green*, 775 F.2d 1381 (9th Cir. 1985), this court granted *Wilson* retroactive application when it had the effect of lengthening, rather than abbreviating, the limitations period. The case before us is not controlled by *Rivera*, because *Rivera* expressly limited its holding to cases in which retroactive application "would advance the litigant's ability to pursue section 1983 remedies at the expense of a [disfavored] statute of limitations defense." *Rivera* at 1384. In this case, retroactive application would thwart, rather than enhance, the remedial purposes underlying section 1983. Thus, we undertake an independent retroactivity analysis on the facts of this case, and we conclude that, when retroactive application would shorten the statute of limitations, *Wilson* merits only prospective effect.¹ We thereby join the Tenth

¹Our result is consistent with a recent line of employee suits under § 301 of the National Labor Relations Act, in which this court determined the retroactivity of an unforeseen Supreme Court redefinition of the limitations period on an openly ad hoc basis, simply by gauging whether the effect in the given case was either to shorten or lengthen the governing period. Compare *Glover v. United Grocers Inc.*, 746 F.2d 1380 (9th Cir. 1984) (adopting six-month statute of limitations retroactively because it lengthened pre-existing period), cert. denied 105 S.Ct. 2357 (1985), with *Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 104 S.Ct. 1599 (1984) (declining retroactive application of a shorter statute of limitations).

Circuit in rejecting retroactive application that would bar "plaintiffs' right to their day in court when their action was timely under the law in effect at the time their suit was commenced." *Jackson v. City of Bloomfield*, 731 F.2d 652, 655 (10th Cir. 1984), (quoted with approval in *Wilson*, at 1941 n.10).

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Supreme Court laid down three factors which courts must weigh in determining whether to apply a newly formulated rule of law retroactively. These factors are: "(1) whether the decision establishes a new principle of law; (2) whether retroactive application will further or retard the purposes of the rule in question; and (3) whether applying the new decision will produce substantial inequitable results." *Barina v. Gulf Trading and Transp. Co.*, 726 F.2d 560, 563 (9th Cir. 1984) (applying *Chevron*, 404 U.S. at 106-07).

Before *Wilson*, this circuit had long held that the California three-year statute of limitations for actions "upon a liability created by statute," Cal. Civ. Proc. Code § 338(1) (West 1982), governed all section 1983 claims brought in California. *Bergschneider v. Denver*, 446 F.2d 569, 570 (9th Cir. 1971); *Smith v. Cremins*, 308 F.2d 187, 190 (9th Cir. 1962). By directing courts to tie section 1983 actions to a different, shorter limitations provision, *Wilson* marks a clear break from settled circuit authority, potentially of great prejudice to litigants who relied upon the earlier rule. Consideration of the first *Chevron* factor thus militates against retroactivity. The second *Chevron* factor—whether retroactive application would advance or retard uniform federal characterization of section 1983 claims—does not counsel either way, because this circuit's clear, consistent enunciation of the previous rule served the chief policy goals articulated in *Wilson*: (1) safeguarding the rights of federal civil rights litigants; (2) achieving certainty; and (3) avoiding wasteful relitigation of collateral matters. The final *Chevron* factor weighs dispositively against retroactive application, for it would yield



“ ‘substantial inequitable results’ to hold that the respondent ‘slept on his rights’ at a time when he could not have known the time limitation that the law imposed upon him.” *Chevron*, 404 U.S. at 108 (citation omitted). The defendants are not prejudiced by enforcing the limitations rule prevailing at the time of their alleged wrongful acts. Accordingly, because the equities clearly favor the plaintiff, we hold under *Chevron* that *Wilson* should not be retroactively applied to oust claims that were timely when filed.

[5] Because of our decision to enforce the three-year California limitations provision anticipated by the parties instead of the one-year provision prospectively required by *Wilson*, we hold that plaintiffs may recover for injury resulting from the city defendants’ overt acts committed after July 1, 1977. The only allegation satisfying this limitation involves the pattern of retaliatory helicopter overflights. Accordingly, we affirm the dismissal of the section 1983 claim against the individual city defendants to the extent that it is based on activity preceding July 1, 1977, but reverse the dismissal of the section 1983 claim to the extent that it is based on occurrences after that date.

B. *Accrual of Federal Civil Rights Conspiracies*

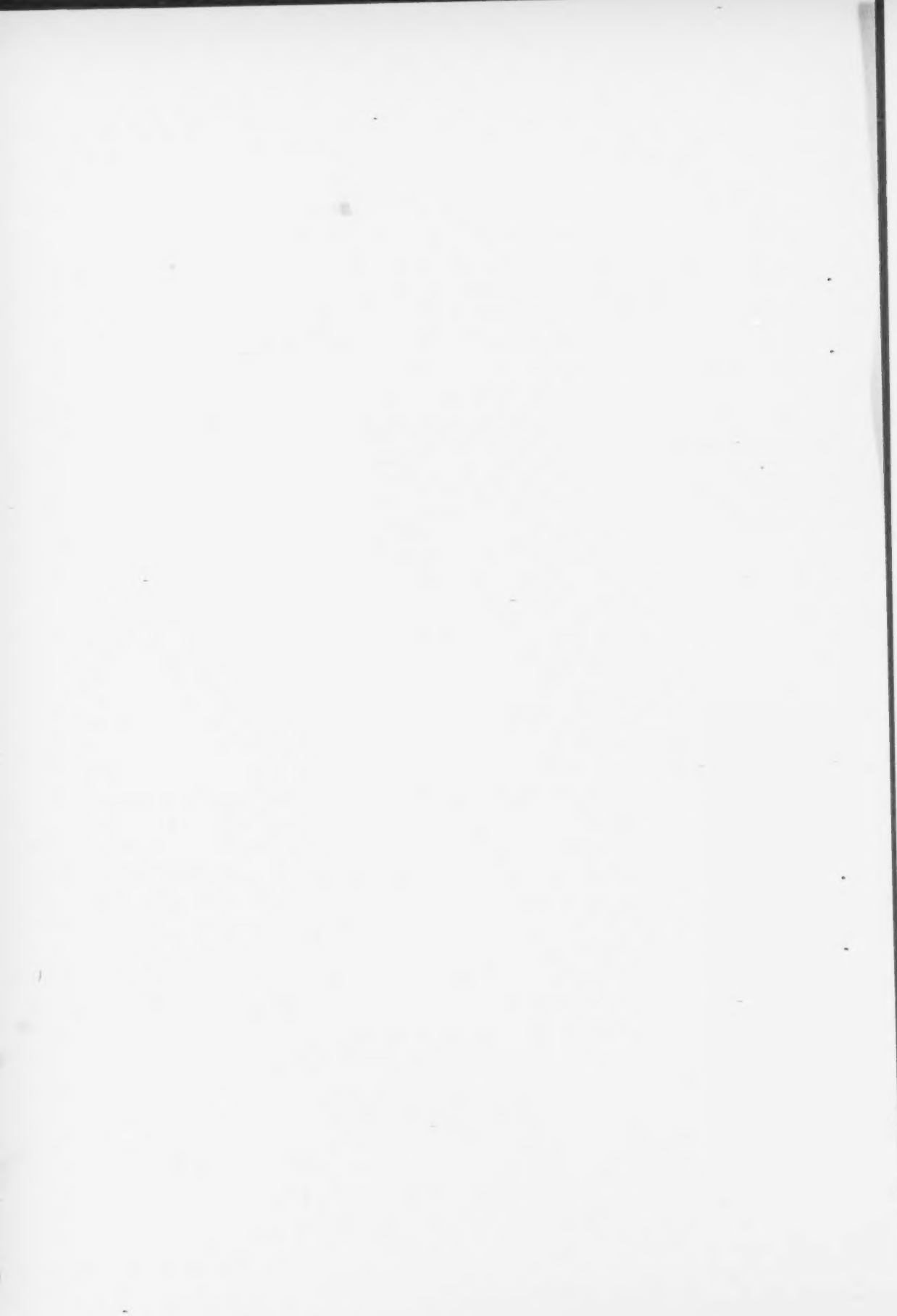
In a misguided attempt to reach time-barred conduct, plaintiffs contend that California law should govern the accrual of their cause of action and that under California law a civil conspiracy in its entirety accrues only when the culminating act in furtherance of the conspiracy occurs. Under this theory, “the statute of limitations does not begin to run on any part of a plaintiff’s claim until the ‘last overt act’ pursuant to the conspiracy has been completed.” *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773, 786, 598 P.2d 45, 53, 157 Cal.Rptr. 392, 400 (1979). Thus, because plaintiffs allege that the offensive helicopter surveillance marked only the latest manifestation of an ongoing civil conspiracy in which city agents participated, they assert their right to recover from these



agents for civil rights violations preceding the limitations period, which would be inescapably time barred if sued on alone.

[6] We reject plaintiffs' reliance on California authority because although state law prescribes the statute of limitation applicable to section 1983 claims, federal law governs the time of accrual. *Venegas v. Wagner*, 704 F.2d 1144, 1145 (9th Cir. 1983); *Gowin v. Altmiller*, 663 F.2d 820, 822 (9th Cir. 1981). The Ninth Circuit determines the accrual of civil conspiracies for limitations purposes in accordance with the last overt act doctrine. *Venegas v. Wagner*, 704 F.2d at 1146; *Bergschneider v. Denver*, 446 F.2d 569 (9th Cir. 1971). Under this doctrine, "[i]njury and damage in a civil conspiracy action flow from the overt acts, not from 'the mere continuance of a conspiracy'." *Kadar Corp. v. Milbury*, 549 F.2d 230, 234 (1st Cir. 1977) (quoting *Hoffman v. Halden*, 268 F.2d 280, 303 (9th Cir. 1959)). Consequently, the cause of action runs separately from each overt act that is alleged to cause damage to the plaintiff. *Lawrence v. Acree*, 565 F.2d 1319, 1324 (D.C.Cir. 1981) (per curiam), and "[s]eparate conspiracies may not be characterized as a single grand conspiracy for procedural advantage." *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C.Cir. 1977). Accordingly, plaintiffs may recover only for the overt acts, i.e., the helicopter overflights, that they specifically alleged to have occurred within the three-year limitations period. *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71 (9th Cir.), cert. denied, 444 U.S. 900 (1979).

This circuit applies a rule of reason to civil rights actions challenged for sufficiency at the pleading stage. While "a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled," *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982), plaintiff is not expected "to plead his evidence" or specific factual details not ascertainable in advance of discovery. *Hoffman v. Halden*, 268 F.2d 280, 294-95 (9th Cir. 1959) (overruled on other grounds in *Cohen v. Norris*, 300 F.2d 24,

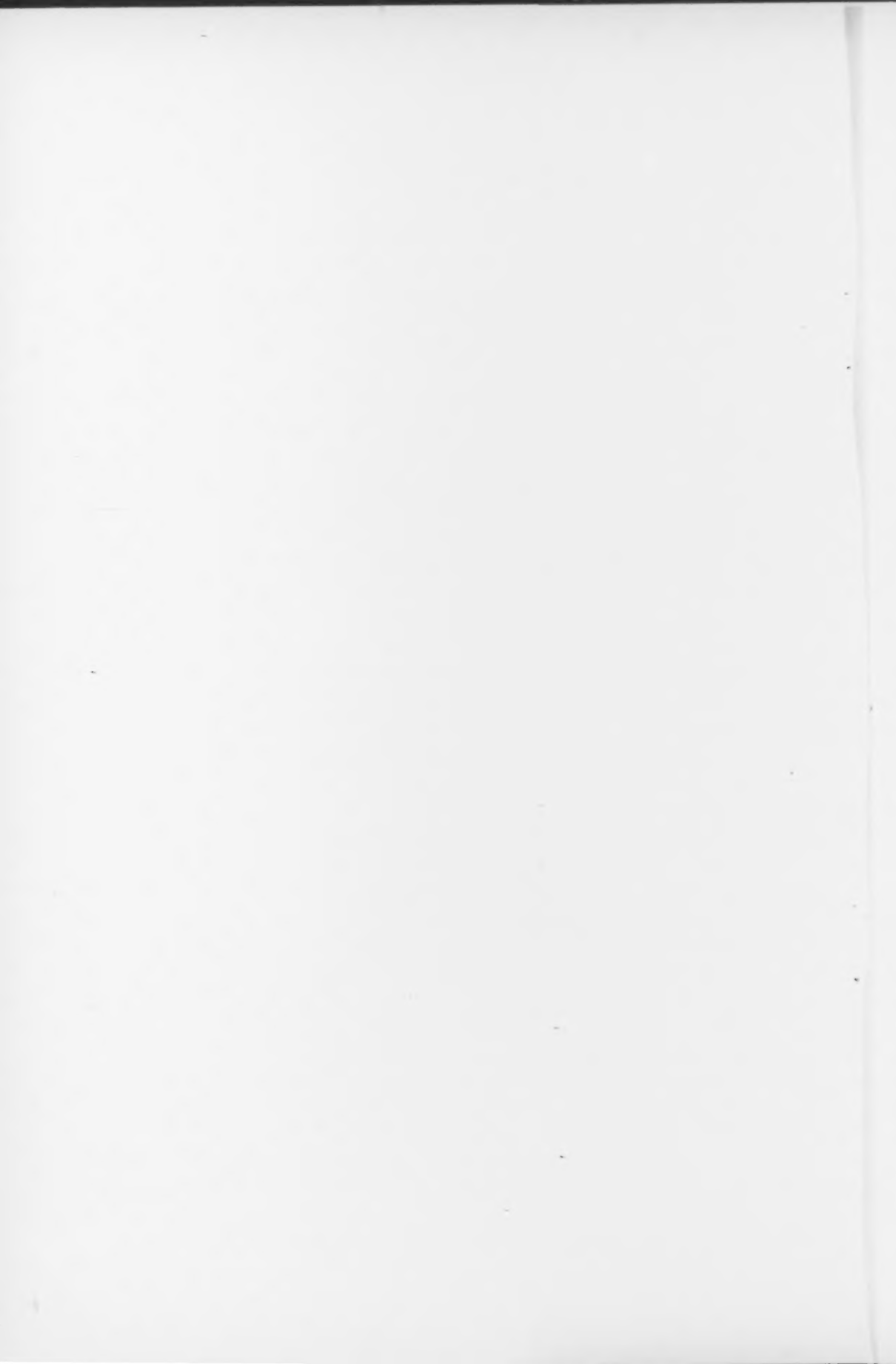


30 (9th Cir. 1962) (en banc)). Although the Second Amended Complaint is hardly a model of clarity, plaintiffs allege "specific, narrowly defined conduct" on the part of the city defendants, *Kadar Corp. v. Millbury*, 549 F.2d at 234, and ensuing damage to their rights. We hold, exclusively with respect to the overflights falling within the limitations period, that plaintiffs met their burden of pleading a civil rights violation cognizable under section 1983.²

III. § 1985(3) CLAIMS AGAINST BOTH THE CITY AND FEDERAL DEFENDANTS

[7] Plaintiffs also seek redress under 42 U.S.C. § 1985(3) against both the federal and the city defendants. Section 1985(3) grants a federal cause of action for damages to anyone who is injured by a conspiracy formed "for the purpose of depriving [him], either directly or indirectly, of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3) (1982). In *Griffin v. Breckinridge*, 403 U.S. 88 (1971), the Supreme Court held that this language reaches purely private conspiracies but requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102; see also *Bretz v. Kelman*, 773 F.2d 1026, 1027-28 (9th Cir. 1985) (en banc); *Gilipste v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980). The Supreme Court recently reaffirmed the specific intent requirement established in *Griffin* and, indeed, explicitly restricted the statutory cover-

²The city defendants ask that we uphold the dismissal of the claims against the unnamed city agents on the ground that plaintiffs' non-compliance with the prompt service required by Fed. R. Civ. P. 4(j) was unexcused. It is true that defendants should be dismissed in the absence of a showing of good cause if plaintiff fails to serve them within 120 days of the filing of the complaint, Fed. R. Civ. P. 4(j); see *United States ex rel. DeLoss v. Kenner Gen. Contractors Inc.*, 764 F.2d 707 (9th Cir. 1985). However, whether the plaintiffs had good cause for their delay in identifying and serving the individual wrongdoers is a factual issue, which must be decided in the first instance by the District Court. *Id.*



age to conspiracies motivated by racial bias. *United Brotherhood of Carpenters and Joiners of America, Local 610 AFL-CIO v. Scott*, 463 U.S. 825, 834-35 (1983). Despite two separate opportunities to cure the deficiencies of their complaint, plaintiffs failed to allege that the law enforcement abuses they claim they suffered were on account of their race. Because we cannot "supply essential elements of the claim that were not initially pled," *Ivey v. Board of Regents*, 673 F.2d at 268, we affirm the dismissal of plaintiffs' section 1985(3) claim.

IV. *BIVENS* ACTION AGAINST THE FEDERAL DEFENDANTS

Plaintiffs allege that FBI agents and their surrogates, acting at FBI instigation, undertook to discourage Gibson's political activities through an array of undercover tactics, such as wiretapping her telephone, passing defamatory information to her employers, and seeking to entrap her in contraband drug transactions. These alleged tactics and maneuvers began with the gathering of a dossier of confidential information in the late 1960's and continued through the initiation of the present lawsuit. Thus, as with the previously analyzed section 1983 claims against the city defendants, we must decide the proper characterization of plaintiffs' claims against the federal defendants and the statute of limitations governing their claims.

[8] Plaintiffs seek *Bivens*-type relief directly under the Constitution for the federal agents' asserted violation of their constitutional rights. *Bivens* actions, the judicially crafted counterpart to section 1983, enable victims of federal misconduct to sue the individual federal wrongdoers responsible for the transgression of their rights. *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), the pioneer case, created such a remedy for Fourth Amendment violations. Plaintiffs' allegations concerning the continual unauthorized interception of Gibson's phone calls fall directly within the coverage of



Bivens. Other allegations, mainly relating to the campaign of harassment to disrupt Gibson's political activities, make out a claim under the First Amendment. While the Supreme Court has yet to extend *Bivens* to First Amendment violations, it has implied a cause of action under the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), thus indicating that the *Bivens* remedy is not restricted to Fourth Amendment claims. Moreover, although this circuit has so far fallen just shy of explicitly authorizing *Bivens* claims based on the First Amendment, see *Fonda v. Gray*, 707 F.2d 435 (9th Cir. 1983), other circuits have upheld such claims. See *Dellums v. Powell*, 566 F.2d 167, 194-95 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978); *Paton v. LaPrade*, 524 F.2d 862, 869-71 (2d Cir. 1975).³ We must now follow these circuits in holding that, because plaintiffs have alleged that FBI agents acted with the impermissible motive of curbing Gibson's protected speech, they have asserted a claim properly cognizable through a *Bivens*-type action directly under the First Amendment. See generally *Angola v. Civiletti*, 666 F.2d 1 (2d Cir. 1981) (reversing dismissal of complaint which alleged that FBI persecuted plaintiff in violation of her First Amendment rights in order to coerce cooperation with pending investigation).

[9] This circuit applies the catch-all four-year limitations provision set forth in section 343 of the California Code of Civil Procedure to *Bivens* actions arising in California. *Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir. 1980).⁴ Applying

³Given the availability of § 1983 relief against state agents who infringe First Amendment rights, see, e.g., *McKinley v. City of Eloy*, 705 F.2d 1110 (9th Cir. 1983), it is hard to see why *Bivens* relief should not be available to redress equivalent violations perpetrated by federal agents. See *Paton v. LaPrade*, 524 F.2d at 870.

⁴Contrary to federal defendants' suggestion, we decline to disregard *Marshall v. Kleppe* as Ninth Circuit precedent on the ground that its analysis of the most fitting California provision to be borrowed for *Bivens* claims is inconsistent with *Board of Regents v. Tomanto*, 446 U.S. 478 (1980).



this limitations provision to plaintiffs' *Bivens* claims⁵, we hold that they have adequately stated a claim that may not be dismissed at the pleading stage as time-barred. Although a number of overt acts attributed to the federal defendants are no longer actionable, some of the alleged acts postdate July 1, 1976, and thus fall within the four-year limitations period. The acts that survive because they allegedly occurred after July 1, 1976, include the following: the alleged transmission of defamatory information to Gibson's superiors so as to induce the termination of her drug counseling job in 1977 and to stymie her opportunities for promotion at a similar post in 1979; the campaign of intimidation, burglary, and petty arson allegedly undertaken since 1980 to discourage pursuit of the present litigation; and the alleged installation of an illegal wiretap on Gibson's telephone in 1974, maintained and intermittently monitored until 1983. Accordingly, we reverse the dismissal of plaintiffs' *Bivens* claim under the First and Fourth Amendment to the extent it is based on activity after July 1, 1976.⁶

Tomanto instructed federal courts, when they borrow state-prescribed limitations provisions, to enforce coordinate tolling rules developed by the state so long as they are not inconsistent with federal policy. *Marshall v. Kleppe* does not rest on policy concerns repudiated by *Tomanto*. To the contrary, *Marshall* is consistent with *Tomanto*, for it identified and faithfully applied the most appropriate state limitations period for *Bivens* claims.

⁵The Supreme Court has yet to decide whether its reasoning in *Wilson v. Garcia* means that *Bivens* claims should also be analogized to state personal injury tort claims for limitations purposes. Recognizing that *Wilson* may require a re-examination of *Marshall v. Kleppe*, see *LeVick v. Skaggs Companies*, 701 F.2d 777 (9th Cir. 1983) (panel may overrule controlling circuit precedent if it has been undermined by intervening Supreme Court decision), we do not find this an appropriate occasion for so doing; even were we to overrule *Marshall*, we would not apply a shorter statute of limitations retroactively to bar claims such as plaintiffs' that were timely when filed. See pages 7-10, *supra*.

⁶Because the allegations against the named FBI agents Will Heaton and Brandon Cleary concern conduct that allegedly transpired before July 1, 1976, our holding with respect to the limitations period for *Bivens* claims affirms the District Court's dismissal of these defendants from the suit.



V. § 1983 CLAIM AGAINST THE FEDERAL DEFENDANTS

[10] Plaintiffs pleaded section 1983 as an alternative basis for obtaining relief from the unnamed federal defendants. However, section 1983 requires that the actionable conduct be under color of state law. Federal officers acting under federal authority are immune from suit under section 1983 unless the state or its agents significantly participated in the challenged activity. See *Green v. Dumke*, 480 F.2d 624, 629 (9th Cir. 1973), *Kletschka v. Driver*, 411 F.2d 436, 448-49 (2d Cir. 1969). Barring plaintiffs' vague and conclusory conspiracy allegations, the complaint fails to allege a single collusive act within the limitations period. See *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982) ("Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.") Accordingly, we affirm the dismissal of the section 1983 claim against the individual federal defendants.

VI. CLAIM AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT

[11] Plaintiffs allege that, as part of the conspiracy, FBI agents directed an agent provocateur named Darthard Perry to enter the Gibson garage surreptitiously, rummage through and remove sensitive documents belonging to Gibson and her political allies, and then burn the garage down to cover his traces. Perry allegedly executed the FBI plot in January, 1974, using a crude incendiary device later discovered by Los Angeles firefighters who put out the blaze. Plaintiffs also allege that, as a final tactic to camouflage federal complicity in the arson of Gibson's garage, unknown FBI agents filed a concocted account of the incident with the Los Angeles fire department, implying that the fire resulted from the negligence of neighborhood youth who frequented the garage to smoke marijuana cigarettes.

We have already held that *Bivens* claims based on activity preceding July 1, 1976, do not satisfy the applicable statute of limitations. However, plaintiffs also seek to recover damages directly from the United States under the Federal Tort Claims Act. Accordingly, we must consider whether plaintiffs' attempted compliance with the jurisdictional prerequisites of 28 U.S.C. § 2401(b) and their argument that affirmative government deception tolled the limitations period allow them to take advantage of the limited waiver of sovereign immunity embodied in the FTCA.

Section 2401(b) of Title 28 states that:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

This section establishes two jurisdictional prerequisites: (1) timely notice of the claim filed with the responsible administrative agency; and (2) prompt prosecution of the claim once the agency notifies the claimant that it has denied administrative relief. *See Dyniewicz v. United States*, 742 F.2d 484, 485 (9th Cir. 1984). The record below indicates that plaintiffs first filed an administrative claim with the FBI on March 31, 1979, seeking compensation for damage to the garage and to several items of furniture and memorabilia itemized in the claim, as well as for their consequent emotional distress. This claim also places the occurrence of the garage fire on January 5, 1974. Therefore, more than five years having passed between plaintiffs' injury and the filing of their administrative notice, their FTCA action is apparently disqualified under section 2401(b). Plaintiffs press two related yet distinct arguments for avoiding lapse of their claim: (1) the claim did not accrue until they discovered the government's complicity



from conversations with an investigative journalist, 1977; and (2) running of the statute of limitations by the government's fraudulent concealment. They acquired independent knowledge of the facts. We consider these arguments in turn.

Allegation of the FTCA Claim

Under federal law, a cause of action generally accrues when the plaintiff knows or has reason to know of the injury on the basis of his action." *Cline v. Brusett*, 661 F.2d 1098 (9th Cir. 1981); see also *Pavlak v. Church*, 727 F.2d 1013 (9th Cir. 1984); *Bireline v. Seagondollar*, 567 F.2d 1098 (9th Cir. 1977), cert. denied, 444 U.S. 842 (1979). In *United States v. Kuorick*, 444 U.S. 111 (1979), the Supreme Court applied the discovery rule to a federal tort claim based on medical malpractice and assumed that plaintiff's cause of action did not accrue until he discovered both the existence of the injury and its cause. Conceding as much, *Kuorick* did not extend the discovery rule further by making a plaintiff's knowledge of the injury accrue until he discovered both the existence of the injury and its cause. As a result, this circuit has repeatedly cited *Kuorick* for the limited proposition that under the FTCA, a claim accrues when the plaintiff knows of the injury and its cause." *Washington v. United States*, 769 F.2d 1098 (9th Cir. 1985); see also *In re: Swine Flu Products*, 764 F.2d 537 (9th Cir. 1985).

The plaintiffs claim that their cause of action against the government did not begin to run until they discovered in 1977 that the agents hatched the plot to burn Gibson's garage. At that time, the incident alone immediately alerted them to the cause of their injury, i.e., the destruction of Gibson's property by fire. The information of which they were made aware in 1977 did not shed any new light on the damage caused by the fire or its origin. Rather, this information alleged the culplicity and the potential liability of the federal government. Accordingly, plaintiffs would have us

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boundaries of the *Kubrick* decision to delay a federal tort claim until plaintiff knows or has reason to know of the culpability of federal agents.

Kubrick, emphasizing the strategic importance of knowing whom to sue, supports plaintiffs' action. See 444 U.S. at 122 ("the prospect is that a plaintiff in possession of the critical facts knows who hurt and who had inflicted the injury"). The 9th Circuit precedent forecloses us from concluding that the extension of *Kubrick*. In *Dyniewicz v. United States*, 748 F.2d 484 (9th Cir. 1984), decedents' children discovered the road that national park rangers may have negligently supervised that led to their death. This court upheld the district judge's dismissal of the children's subsequent FTCA action on the ground that the administrative claim required for judicial review was not timely filed. Distinguishing between the cause of action for the party responsible for inflicting it, the court held that the 'cause' is known when the immediate physical injury is discovered." *Id.* at 486. The court reasoned that the plaintiffs knew "both the fact of injury and its legal cause . . . [their] cause of action accrued at the time of the involvement of United States Forest Service." *Id.* at 487. Likewise, in *Davis v. United States*, 742 F.2d 328 (9th Cir. 1981), this court ruled that in the absence of fraudulent concealment it is plain error to require, within the statutory period, to determine when the plaintiff knew to sue." *Id.* at 331. These precedents compel the conclusion that plaintiffs' federal tort claim accrued in 1974 when they learned of the property destruction caused

Plaintiffs' Concealment Issue

ultimately, plaintiffs are left with their alternative fraudulent concealment argument. Plaintiffs contend that the

spurious account filed with the Los Angeles Fire Department, thus, irrespective of the statute of limitations, the exercise of due diligence would make out a claim of fraud. The plaintiff must plead with particularity the concealment and steps taken to uncover the fraud. *Rubber Co.*, 576 F.2d 1111 (9th Cir. 1977). The plaintiff "must show upon the part of the defendant the circumstances of the case that he did not have the opportunity to discover." *Westinghouse Electric Corp. v. Westinghouse Electric Corp.*, 1980).

We reject plaintiff's arguments for the following reasons. First, plaintiff's claim that the allegedly fraudulent discovery of an incendiary bomb made it apparent to plaintiff that the bomb was ignited by trespasser's actions, alleged she knew the door was fully locked. Second, plaintiff took diligent efforts to discover the source of the fire. Second Amended Complaint's allegations of fraudulent concealment of plaintiff's FTCA claim are barred by the statute of limitations. 1974, and was constructive notice was given years too late. Accordingly, plaintiff's FTCA claim is dismissed.

We affirm the dismissal of plaintiff's claim against the City of Los Angeles.

auspices with the Los Angeles County concealed the arson and accrual, requires tolling the unmasked or through the have unmasked the fraud. To concealment, plaintiff "must circumstances surrounding the ing his due diligence in trying *Id. v. Boston Woven Hose and* (9th Cir. 1978). Additionally, showing affirmative conduct which would, under the circumstances, lead a reasonable person to believe relief." *Id.*; see also *Conerly*, 623 F.2d 117, 120 (9th Cir.

concealment claim for two not reasonably have relied on the fire marshal's report immediately after the fire because the fire was not accidentally caused, particularly since Gibson kept the garage door carefully closed to allege that they underestimated the time period to identify the cause. 576 F.2d at 250. As the court refused to allege the requisite element, we must rule that plaintiff's claim for interruption from January, 1979, is time-barred when the administrative decision, 1979—more than three years—affirm the dismissal of the

DISCUSSION

plaintiffs' section 1983 claim and their section 1985(3) claim.

their section 1983 claim against the unnamed defendants, and their FTCA claim. We reverse the plaintiffs' section 1983 claim against the unnamed defendants to the extent it is based on activity prior to July 1, 1976. Likewise, we reverse the dismissal of plaintiffs' FTCA claim against the unnamed federal defendant to the extent it is based on activity after July 1, 1976.

AFFIRMED IN PART, REVERSED IN PART,
REMANDED.

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APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMILY FULLER GIBSON, MICHELLE
GIBSON and MELANIE GIBSON,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA, WILLIAM
FRENCH SMITH, Attorney General of
the United States; WILLIAM WEBSTER
Director, Federal Bureau of
Investigation (FBI); WILL HEATON,
Special Agent, FBI; BRANDON CLEAR
Special Agent, FBI, DARTHARD PERRIN
aka ED RIGGS, THE CITY OF LOS
ANGELES; DARYL GATES, Chief, Los
Angeles Police Department (LAPD),

Defendants-Appellees.

Before: NORRIS and BEEZER, Circuit
MUECKE, * District Judge.

The panel, as constituted,
animously voted to deny the petition
for rehearing and to reject the suggestion
for en banc.

The full court has been advised of the
suggestion for en banc rehearing and
the court has requested a vote on

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CV
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*The Honorable C.A. Muecke,
for the District of Arizona,
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APPENDIX C

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 CITY OF LOS ANGELES

UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

FAMILY FULLER GIBSON,) No. CV 80-2858-AAH(Mx)
et al.,)
) ORDER DISMISSING
Plaintiffs,) SECOND AMENDED
) <u>COMPLAINT</u>
vs.)
)
UNITED STATES OF AMERICA,)
et al.,)
)
Defendants.)
)

On May 16, 1983, defendants UNITED STATES
 OF AMERICA, WILL HEATON and BRANDON CLEARY (fed-
 eral defendants) and CITY OF LOS ANGELES (city
 defendant) brought on Motions to Dismiss before

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dge. Plaintiffs were represented by
ney, Lawrence Teeter, the city defen-
represented by Ira Reiner, City At-
os Angeles, and John T. Neville, Sen-
nt City Attorney by Philip Shiner,
ity Attorney, and the federal defen-
represented by Stephen S. Trott, Unit-
ttorney, and Frederick M. Brosio, Jr.,
United States Attorney, Chief, Civil
y Stephen D. Petersen, Assistant Unit-
ttorney. The court having considered
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t is hereby:

ED that plaintiffs' Second Amended Com-
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Presented By:

IRA REINER, City
JOHN T. NEVILLE,
Senior Assistant
PHILIP SHINER,
Assistant City At

By

PHILIP SHINER
Assistant City

Attorneys for Def
CITY OF LOS ANGEL

[This Order was f
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Solicitor General,
Department of Just
Washington, D.C. 20

Stephen D. Petersen
Assistant U.S. Att
312 N. Spring Street
Los Angeles, CA 900

Katherine J. Hamil
Deputy City Attorne
1700 City Hall East
200 N. Main Street
Los Angeles, CA 900

EXECUTED this 20th day o
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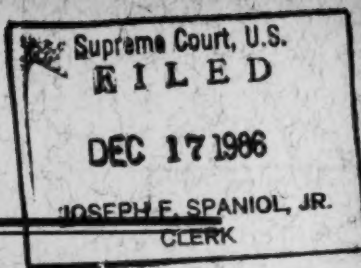
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No. 86-676



the Supreme Court of the United States

OCTOBER TERM, 1986

EMILY FULLER GIBSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

**N PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**MEMORANDUM FOR THE
FEDERAL RESPONDENTS IN OPPOSITION**

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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**WRIT OF CERTIORARI TO THE
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E NINTH CIRCUIT**

**ANDUM FOR THE
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² The court of appeals als
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⁴ The court of appeals not
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meritless: since petitioners also alleged they discovered an incendiary device at the time they would not reasonably have relied on the false report. The court also noted that petitioners failed to allege that they undertook diligent efforts within the limitations period to identify the person responsible for the fire. Pet. App. 19a-20a.

3. The fact-bound rulings of the court of appeals on the two issues raised in the petition ⁶ drew this Court's attention.

a. Contrary to petitioners' assertions, the court of appeals' resolution of the FTCA tolling issue was only the application of settled legal principles to the facts of this case. In the court of appeals, petitioners presented two theories to excuse their failure to file an administrative claim until 1979 in connection with the alleged burning of their garage in 1974.⁷ They asserted, first, that their cl

⁶ Petitioners do not here challenge the dismissal of their Section 1985(3) claim. See Pet. 4. Moreover, petitioners do not appear to challenge the court of appeals' affirmation of the dismissal of the Section 1983 claim against the federal defendants on the ground that those defendants did not act in color of state law because, "[b]arring [petitioners'] direct and conclusory conspiracy allegations, the court of appeals alleged a single collusive act within the limitations period between the federal and the local defendants (P

⁷ Only the 1974 garage fire was described in the administrative claim and the Second Amendment. The administrative claim (Exh. 2 to the federal government's Motion to Dismiss, dated August 29, 1980) also mentioned the 1978 discovery of a "metallic disk" that suggested might be related to electronic surveillance. Declaration of Emily Gibson in Support of the Administrative Claim paras. 24-27; the government argued in the court of appeals that this matter was not adequately

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fendant's possible involvement.⁸ The plaintiff should be excused from timely filing his claim only if the defendant affirmatively concealed his identity.⁹ Petitioners may believe that on the facts of this case the plaintiff adequately alleged such concealment, but the court of appeals found otherwise.¹⁰ This fact-bound question does not merit this Court's review.

⁸ The decision of the court of appeals is not in conflict with this Court's decision in *United States v. Kubrick*, 444 U.S. 315 (1979). While, as petitioners note, this Court did say in its opinion that "[t]he prospect is not so bleak" for someone like the plaintiff in that case who knows "who has inflicted the injury" (444 U.S. at 122) that remark in no way suggests that the time for filing a claim is always—or even usually—tolled if the plaintiff does *not* know who inflicted the injury.

⁹ Petitioners suggest that "[t]he fact that such fraudulent conduct in the present case may not have succeeded in convincing [petitioners] to even initially cast blame for the attack upon neighborhood youths seems quite beside the point" (Pet. 20-21). To the contrary, it is quite the central point. Since petitioners were not reasonably misled by the alleged snatching youths story, then the only alleged act of fraudulent concealment had no effect on them. A failed attempt at fraudulent concealment does not give a plaintiff a blank check to sit on his rights until he happens to discover the identity of the potential defendant. Contrary to petitioners' suggestion (Pet. 21), none of the cases suggest such an illogical and inequitable rule.

¹⁰ Petitioners suggest in passing that the court of appeals was in error in failing to allow them to amend their complaint a third time to better allege the elements of fraudulent concealment (Pet. 12 n.1). The district court warned petitioners when it permitted them to file a Second Amended Complaint that "this would be [petitioners'] last opportunity to amend their complaint in order to avoid a final dismissal with prejudice" (Pet. App. 26a). The district court is entitled to draw the line at three attempts to fashion an adequate complaint and need not allow a fourth, particularly after giving petitioners fair warning.



b. Petitioners also argue that they should be allowed to recover damages from the individual respondents in their personal capacities for actions in furtherance of the alleged conspiracy taken beyond the statute of limitations period. Petitioners suggest that the state rule should be applied, under which all overt acts in furtherance of a conspiracy are timely pleaded whenever the most recent overt act of the conspiracy occurred within the limitations period. See *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773, 598 P.2d 45, 157 Cal. Rptr. 392 (1979). Instead, the court of appeals followed the rule of a majority of federal courts of appeals that have addressed the issue, under which only those overt acts committed within the limitations period are deemed timely pleaded (see Pet. App. 11a). *Lawrence v. Acree*, 665 F.2d 1319, 1324 (D.C. Cir. 1981); *Kadar Corp. v. Milbury*, 549 F.2d 230, 234 (1st Cir. 1977); *Rutkin v. Reinfeld*, 229 F.2d 248, 252 (2d Cir.), cert. denied, 352 U.S. 844 (1956); *Wells v. Rockefeller*, 728 F.2d 209, 217 (3d Cir. 1984) and cases there cited; *Crummer Co. v. du Pont*, 223 F.2d 238, 247-248 (5th Cir.), cert. denied, 350 U.S. 848 (1955); *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71 (9th Cir.), cert. denied, 444 U.S. 900 (1979). But see *White v. Bloom*, 621 F.2d 276, 281 (8th Cir.), cert. denied, 449 U.S. 995 (1980); *Slavin v. Curry*, 574 F.2d 1256, 1261 (5th Cir. 1978).

Petitioners further assert that this Court's decision in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), requires that the state rule be applied (Pet. 26). But *Tomanio* recognizes that the state tolling rule should not be followed if it is "inconsistent with the federal policy underlying the cause of action under consideration." 446 U.S. at 485, quoting *John-*

on v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).¹¹ Here, if conspiracy allegations can be used to relate a complaint back years or even decades, the protection of federal officers against frivolous or harassing *Bivens* actions would be severely weakened, in conflict with this Court's off-stated policy of effective immunity protection for federal officers. The circuit conflict on this issue should not be reviewed in the context of this case, since the only overt acts that petitioners allege were committed within the limitations period are the vaguely described actions of persons who were never named and as to whom all charges have since been dismissed for lack of service.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1986

¹¹ This standard is based on 42 U.S.C. 1988, which makes actions under 42 U.S.C. 1983 expressly subject to state law unless "inconsistent with the Constitution and laws of the United States * * *." Since petitioners seek damages from the individual federal respondents under a *Bivens* theory rather than a Section 1983 theory, this statutory mandate does not apply, and the relevance of *Tomanio* is questionable.